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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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10 **CHARLENE TOWNSEND,**
11 **VIVIAN MENTA and DORINDA**
12 **IRON CLOUD, heirs of decedent,**
13 **MICHAEL ESPERANZA,**

14 Plaintiffs,

15 v.

16 **IMPERIAL COUNTY; and**
17 **DOES 1 to 50, Inclusive,**

18 Defendants.
19

Case No. 12-cv-2739-WQH (PCL)

**ORDER ON DEFENDANT'S
MOTION FOR PROTECTIVE
ORDER AS TO PLAINTIFFS'
NOTICE OF DEPOSITION OF
GEOFFREY HOLBROOK AND
REQUEST FOR DOCUMENTS**

20 **I. INTRODUCTION**

21 Now before the Court is Defendant's Motion for Protective Order as to
22 Plaintiffs' Notice of Deposition of Geoffery Holbrook and Request for Documents,
23 filed on May 2, 2014. (Doc. 30.)

24 According to his declaration, Mr. Holbrook's involvement in this litigation
25 stems from his role as Senior Deputy County Counsel for the Defendants, County
26 of Imperial and his placement on the Death Review Team responsible for
27 investigating Michael Esperanza's death. (*Id.* at 11.) Mr. Holbrook has provided
28 legal advice to Defendant's counsel, and his "singular role" as a member of the
Death Review Team was to provide legal advice. (*Id.* at 11.)

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II. DISCUSSION

Federal law authorizes federal courts to issue protective orders in connection with discovery. F.R.C.P. Rule 26(c). The Court may, for good cause and after good faith attempts by the parties to resolve the dispute without court action, issue an order to protect a party or person. (Id.) Any such order, however, requires that the court's determination "identify and discuss the factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." Phillips v. Gen. Motors, 307 F.3d 1206, 1212 (9th Cir.2002). Generally, "those opposing discovery are required to carry a heavy burden of showing why discovery should be denied." Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975).

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence prohibit taking the deposition of an opposing party's attorney. Shelton v. America Motors Corp., 805 F.2d 1323, 1327 (8th Cir.1986); Johnston Development Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 352 (D.N.J.1990). In fact, Rule 30(a) of the Federal Rules of Civil Procedure permits a party to take the testimony of "any person " by deposition, without leave of court. The Rule sets forth certain exceptions to this provision, none of which exempt a party's attorney from being subject to deposition. See NFA Corp. v. Riverview Narrow Fabric, Inc., 117 F.R.D. 83, 84 (D.N.C.1987).

Citing the lack of any prohibition in the Federal Rules against obtaining the deposition of adverse counsel, at least one court has held that a party seeking a protective order to preclude its attorney's deposition must bear the burden, under Rule 26(c) of the Federal Rules of Civil Procedure, of demonstrating good cause to preclude or limit the testimony. Johnston, 130 F.R.D. at 352, citing Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir.1986).

However, other courts have held that because of the negative impact that deposing a party's attorney can have on the litigation process, the taking of opposing counsel's deposition should be permitted only in limited circumstances,

1 and that the party seeking to depose another party's attorney must demonstrate the
 2 propriety and the need for the deposition. Shelton, 805 F.2d at 1327; Harriston v.
 3 Chicago Tribune Company, 134 F.R.D. 232, 233 (N.D.Ill.1990); Hay and Forage
 4 Industries v. Ford New Holland, Inc., 132 F.R.D. 687, 689 (D.Kan.1990); West
 5 Peninsular Title Company v. Palm Beach County, 132 F.R.D. 301, 302
 6 (S.D.Fla.1990); Advance Systems, Inc. of Green Bay v. APV Baker PMC, Inc.,
 7 124 F.R.D. 200, 201 (E.D.Wis.1989); NFA Corp., 117 F.R.D. at 85. For example,
 8 when a party's attorney is a fact witness, such as an "actor or a viewer." Am. Cas.
 9 Co. of Reading, Pa. v. Krieger, 160 F.R.D. 582, 589 (S.D.Cal.1995). Under these
 10 circumstances, courts allow depositions of an opposing party's attorney where the
 11 party seeking to take the deposition can show that: "(1) No other means exist to
 12 obtain the information than to depose opposing counsel; (2) The information
 13 sought is relevant and nonprivileged; and (3) The information is crucial to the
 14 preparation of the case." Id. at 589; See also Light Salt Investments, LP v. Fisher,
 15 13CV1158-MMA-DHB, 2013 WL 3205918 (S.D. Cal. June 24, 2013) (applying
 16 Kreiger's three prong test when analyzing motion for protective order to prevent
 17 deposition of counsel).

18 Both parties have argued extensively in their moving papers regarding the
 19 applicability of Shelton v. America Motors Corp., *supra*, which would put the
 20 burden to show good cause on the party seeking to depose counsel, and require the
 21 application of the above three-prong test. Shelton, 805 F.2d at 1327.

22 Plaintiffs argue that *Shelton* does not apply because Holbrook is not
 23 "litigation counsel," as defined in a case outside the Ninth Circuit, United States v.
 24 Phillip Morris Inc., 209 F.R.D. 13, 17 (D.D.C. 2002) (holding, *inter alia*, that
 25 *Shelton* applies only to "trial counsel or counsel directly involved in representing a
 26 party in the case.") (Doc. 37, at 15.)

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28 Defendants argue that *Shelton* does apply. (Doc. 39, at 6.) Defendant's

1 authority is also a case outside the Ninth Circuit, Gruenbaum v. Werner
2 Enterprises, Inc., 270 F.R.D. 298, 309-10 (S.D. Ohio 2010) (holding, *inter alia*,
3 that *Shelton* applies to protective orders for depositions of in-house counsel.) (Doc.
4 39, at 6.)

5 The most recent and analogous cases from the Southern District of California
6 apply *Shelton*. Am. Cas. Co. of Reading, Pa. v. Krieger, *supra*; Light Salt
7 Investments, LP v. Fisher, *supra*.

8 In *Krieger*, similar to the case at hand, a protective order was sought to
9 prevent deposing “associate counsel,” who assisted litigation counsel in preparing
10 pleadings and the discovery process, and who “play[ed] no role in the present
11 case.” *Krieger*, *supra* at 588-89. The court noted that the deposition “will not cause
12 the disruption that would be engendered by the taking of depositions of a party’s
13 lead litigation counsel,” but that “the danger still exists that the attorney-client
14 privilege and/or the work product doctrine may be implicated” in light of the
15 attorney’s role in the litigation. *Id.* The court then applied the three *Shelton* criteria
16 in analyzing the motion for protective order. *Id.*

17 In *Light Salt Investments*, a protective order for deposition of non-party
18 corporate counsel was sought. Light Salt Investments, LP v. Fisher, *supra* at *2.
19 The court recognized that the corporate counsel did not represent any part in the
20 case, and that technically the attorney was not adversary counsel. *Id.* Nonetheless,
21 in determining whether the plaintiff should be allowed to depose a non-party’s
22 corporate counsel, the court applied *Shelton* through citation of *Krieger*. *Id.* at *2-
23 3.

24 Thus, whether or not Mr. Holbrook is “litigation counsel,” in determining
25 whether to grant a protective order preventing his deposition the Court will apply
26 *Shelton*’s three-prong test: (1) No other means exist to obtain the information than
27 to depose opposing counsel; (2) The information sought is relevant and non-
28 privileged; and (3) The information is crucial to the preparation of the case.”

1 *Shelton, supra*, at 1327.

2 Ostensibly, Plaintiff's intention in deposing Mr. Holbrook is to procure non-
3 privileged information regarding the findings of the Death Review Team and a
4 history of the Team's meetings. In fact, Plaintiff lists several intended deposition-
5 question themes to this effect. (Doc. 37, at 9.) If true, and the information sought
6 from Mr. Holbrook is specific only to the Team, and not to Mr. Holbrook as
7 associate counsel, Plaintiffs will find as much purchase with any member of the
8 Team as Mr. Holbrook. As Defendants point out in their Reply, there are seven
9 members of the Death Review Team. (Doc. 39, at 7.) Plaintiffs have taken
10 depositions of only two members of the team. (*Id.*) Thus, other than Mr. Holbrook,
11 there are four members of the Team from whom Plaintiffs could seek information.

12 The course which best preserves the concerns of *Shelton* is avoiding the
13 immediate deposition of Mr. Holbrook. Deposing a different Team member will
14 avoid "the danger... that the attorney-client privilege and/or the work product
15 doctrine may be implicated," in light of Mr. Holbrook's role as County counsel.
16 See Krieger, supra at 588-89.

17 Thus, it is clear that Plaintiff's have not exhausted all avenues to the
18 information they seek; *Shelton*'s first prong has failed. The Court does not deign to
19 consider the remaining *Shelton* prongs, as the three are a conjunctive predicate to
20 the taking of opposing counsel's deposition. Shelton, supra, at 1327.

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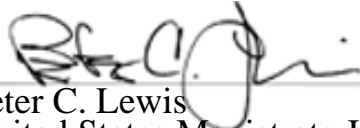
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III. CONCLUSION

The Court **GRANTS** Defendant's Motion for a Protective Order as to Plaintiff's Notice of Deposition of Geoffery Holbrook and Request for Documents. (Doc. 30.)

IT IS SO ORDERED.

DATED: May 19, 2014


Peter C. Lewis
United States Magistrate Judge

cc: The Honorable William Q. Hayes
All Parties and Counsel of Record